

**IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT  
FRANKLIN COUNTY, OHIO**

In the Matter of:

James Wolfe, Jr.,	:	NO. 07AP-15
(James Wolfe, Jr. Appellant)		(Regular Calendar)
(James Wolfe, Sr.,	:	NO. 06AP-1017
Appellant)		(Regular Calendar)

**REPLY BRIEF OF APPELLANT,  
JAMES WOLFE, JR.**

Robert McClaren, Esq. (0046657)  
Franklin County Children Services  
855 W. Mound St.,  
Columbus, Ohio 43223  
614-275-2587  
Fax: 614-275-2589

Karin Demaree, Esq. (0071696)  
Guardian Ad Litem for the Minor Child  
P.O. Box 416  
Worthington, OH 43082  
614-582-9777

Tariq H. Zeidan, Esq. (0078229)  
Joseph A. Nigh, Esq. (0078728)  
Attorneys for Appellant,  
James Wolfe, Sr.  
Nigh & Zeidan LLC  
536 S. High St.  
Columbus, OH 43215  
614-228-6889  
Fax: 614-228-0253

Angela M. Lloyd (0076150)  
Bridget Purdue, Legal Intern  
Alicia Zambelli, Legal Intern  
Attorney for the Appellant,  
James Wolfe, Jr.  
The Justice for Children Project  
The Moritz College of Law  
55 W. 12th Ave.  
Columbus, OH 43210  
614-292-9176  
Fax: 614-292-5511

Jason Macke (0069870)  
Attorney for the Appellant,  
James Wolfe, Jr.  
The Justice for Children Project  
The Moritz College of Law  
55 W. 12th Ave.  
Columbus, OH 43210  
614-247-4236  
Fax: 614-292-5511

## TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
REPLY ARGUMENT	1
CERTIFICATE OF SERVICE	9
APPENDIX	10

## TABLE OF AUTHORITIES

### Cases

<i>Endsley v. Endsley</i> (1993), 89 Ohio App.3d 306, 624 N.E.2d 270.....	6
<i>In Re Baby Girl Baxter</i> (1985), 17 Ohio St.3d 229, 232, 479 N.E.2d 257, 260.....	2
<i>In re C.C.</i> , Franklin App. No. 04AP-883, 2005-Ohio-5163.....	5
<i>In Re Davis</i> (Nov 5, 1999), Pickaway App. Nos. 99 CA 20, 99 CA 21.....	5, 6
<i>In Re Malone</i> (Feb 26, 2007), Marion App. Nos. 9-06-28, 9-06-29,2007-Ohio-769.....	2,5,6
<i>In Re Miller</i> (1995), 101 App.3d 199.....	6
<i>In Re Stacey S.</i> (1999), 136 Ohio App.3d 503, 737 N.E.2d 92.....	2
<i>In Re Williams</i> (2004), 101 Ohio St.3d 398, 805 N.E.2d 1110.....	2,3
<i>In Re Wise</i> (1994), 96 Ohio App.3d 619, 645 N.E.2d 812.....	5
<i>In Re Young Children</i> (1996), 76 Ohio St.3d 632, 1996-Ohio-45, 669 N.E.2d 1140.....	5,6
<i>Mathews v. Eldridge</i> (1976), 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18.....	3,4
<i>Moore v. City of East Cleveland</i> (1977), 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531.....	1,2,4,7
<i>Rose v. Clark</i> (1986), 478 U.S. 570, 106 S.Ct. 3101.....	1,2
<i>Seasons Coal Co., Inc. v. Cleveland</i> (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273.....	5
<i>U.S. v. Gonzalez-Lopez</i> (2006), 126 S.Ct. 2557.....	1

### Statutes

R.C. 2151.352.....	2
R.C. 2151.413(A).....	2
R.C. 2515.414(B).....	3,5,6,7
R.C. 2151.415.....	5,6

### Other Authorities

Juv.R. 4.....	1
---------------	---

## ARGUMENT

### **I. The deprivation of James Jr.’s constitutional rights, at nearly all stages of the lower court proceedings, constitutes structural error.**

The Supreme Court has recognized that certain “constitutional errors require reversal without regard to the evidence in the particular case.” *Rose v. Clark* (1986), 478 U.S. 570, 577, 106 S.Ct. 3101, 3105. These structural defects fundamentally “affect the framework within which the trial proceeds.” *U.S. v. Gonzalez-Lopez* (2006), 126 S.Ct. 2557, 2564, 165 L.Ed.2d 409. These errors are so pervasive that they “taint the entire proceeding,” *Gonzalez-Lopez*, 126 S. Ct. at 2563-64, and “necessarily render[ ] a trial fundamentally unfair.” *Rose*, 478 U.S. at 577. The Court has explicitly recognized that the denial of one’s right to counsel is a structural error. *Gonzalez-Lopez*, 126 S.Ct. at 2564.

Further, the child, James Jr., enjoys a constitutionally protected fundamental right to maintain familial integrity with his biological father. *Moore v. City of East Cleveland* (1977), 431 U.S. 494, 503, 97 S.Ct. 1932, 52 L.Ed.2d 531. Thus, given both the fundamental rights at stake for James Jr. and the non-waivable structural error in the lower court proceedings, Appellee FCCS’s arguments are inherently infirm.

#### **A. Denial of James Jr.’s right to counsel at nearly every stage of the lower court proceeding was structural error.**

Contrary to FCCS’s assertion, James Jr. is entitled to separate counsel at *every stage* of his abuse, custody, and termination proceedings. Because state intervention into the parent-child relationship puts the child’s fundamental right to familial integrity at stake, R.C. 2151.352 provides that “[a] child...is entitled to representation by legal counsel at *all stages of the*

*proceedings* under [Chapter 2151] or Chapter 2152.” R.C. 2151.352. (Emphasis added.)

Juvenile Rule 4 further reiterates this right to counsel, providing that:

Every party shall have the right to be represented by counsel and every child...the right to appointed counsel if indigent. These rights shall arise when a person becomes a party to a juvenile court proceeding. When the complaint alleges that a child is an abused child, the court must appoint an attorney to represent the interests of the child.

Juv.R. 4. The Ohio Supreme Court has further confirmed the child’s right to counsel, holding that “under the plain language of R.C. 2151.352, indigent children...are entitled to appointed counsel in *all juvenile proceedings*.” *In Re Williams* (2004), 101 Ohio St.3d 398, 402, 805 N.E.2d 1110. (Emphasis added.)

Because James Jr. was deprived of his right to counsel at every stage of the proceeding until the permanent termination hearing, non-waivable structural error exists, rendering every uncounseled proceeding fundamentally unfair. *Rose*, 478 U.S. at 577. Because the uncounseled abuse and temporary custody proceedings were necessary prerequisites to the permanent custody proceeding, this proceeding too was fundamentally unfair. R.C. 2151.413(A); *In re Malone* (Feb 26, 2007), Marion App. Nos. 9-06-28, 9-06-29, 2007-Ohio-769, at ¶ 20.

FCCS asserts that James Jr.’s interests were represented at all stages of the proceedings because he was appointed a guardian ad litem. (Appellee’s Brief, at 16.) Appointment of a guardian ad litem alone, however, is insufficient to satisfy James Jr.’s right to counsel. *In re Stacey S.* (1999), 136 Ohio App.3d 503, 513, 737 N.E.2d 92, 100. The duties of an attorney to his client and the duty of a guardian ad litem to his ward “are not always identical and, in fact, may conflict.” *In Re Baby Girl Baxter* (1985), 17 Ohio St.3d 229, 232, 479 N.E.2d 257, 260.

While the role of guardian is “to investigate the ward’s situation and then to ask the court to do what the guardian feels is in the ward’s best interest,” the role of the attorney is to zealously

represent his client within the bounds of the law.” *Id. See also, In Re Williams*, 101 Ohio St.3d 398, 405.

The insufficiency of the guardian in this case is particularly apparent as James Jr.’s wish to live with his father was clearly in conflict with the recommendation of the guardian. Thus, the trial court committed a fundamental non-waivable structural error in its failure to appoint counsel for James Jr. for each stage of the proceeding.

**B. Because the lower court proceedings were fundamentally flawed, James Jr.’s failure to object to issues at trial does not deprive him the right to raise these issues on appeal.**

FCCS asserts that the following issues are waived on appeal because they were not objected to at trial: that the guardian ad litem failed to faithfully discharge her duties; that the guardian’s report contained inadmissible hearsay; that R.C. 2515.414(B)(1)(d) is unconstitutional. However, because James Jr.’s constitutional right to familial integrity is at stake, and because he was deprived of counsel throughout the early stages of the proceeding to safeguard these rights, the lower court proceedings suffered non-waivable structural error.

Given this structural error, James Jr.’s failure to object to the above named issues at trial does not deprive him of the right to raise these issues on appeal. The failure to appoint counsel for James Jr. at the initial abuse adjudication and at the temporary custody hearing fundamentally tainted all of the subsequent proceedings. Due to this structural error, James Jr. may raise these issues on appeal.

**C. Given the constitutional rights at stake, service upon FCCS was insufficient to protect James’ due process right to notice.**

The “essence of due process is the requirement that a person in jeopardy of serious loss [of rights] be given notice of the case against him and opportunity to meet it.” *Mathews v.*

*Eldridge* (1976), 424 U.S. 319, 348-9, 96 S.Ct. 893, 47 L.Ed.2d 18. In these proceedings, James Jr. had a serious loss of rights at stake—his constitutional right to familial integrity with his biological father. *Moore*, 431 U.S. at 503. Thus, where James Jr. is at risk of losing his right to familial integrity, he must be provided adequate due process, including the right to notice of any hearings that could jeopardize this fundamental right.

FCCS argues that where it has custody of a minor child, the child need not be served notice of any hearings concerning his custody or future placement. (Appellee’s Brief, at 15-16.) Taking this argument to its logical extension, however, children in state custody need never be informed of anything regarding their own custody or legal relationship with their parents—a clear deprivation of a child’s liberty. Here, because the state was acting affirmatively to sever James Jr.’s constitutionally protected familial rights, the state cannot simultaneously claim that it was protecting the child’s right to receive notice.

Thus, that FCCS was James Jr.’s legal custodian at the time of the hearings is irrelevant to ensuring that James Jr.’s individual due process rights were protected. James Jr. possesses his own right to substantive due process, and thus, to notice of the hearings that affect his future. The need to provide the child with notice is particularly glaring in this case where FCCS’s recommendations were in clear conflict with James Jr.’s wishes. Because James Jr. did not receive notice of any of the early proceedings in this case, his right to substantive due process was violated.

Finally, FCCS asserts that on review, permanent custody motions must be supported by “some competent, credible evidence.” (Appellee’s Brief, at 4.) The “some competent, credible evidence” standard is appropriate in civil cases where the standard at trial was proof by a

preponderance of the evidence. *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273. In a hearing on a motion for permanent custody, however, a clear and convincing evidence standard applies. R.C. 2151.414(B)(1). Thus, on appeal, this Court must determine whether the juvenile court had sufficient evidence in the record to satisfy this clear and convincing standard. *In re C.C.*, Franklin App. No. 04AP-883, 2005-Ohio-5163, at ¶ 69; *In re Wise* (1994), 96 Ohio App.3d 619, 626, 645 N.E.2d 812.

**II. FCCS' temporary custody order expired on October 6, 2003, therefore, pursuant to R.C. 2151.414, James Jr. was only in FCCS' custody for 10 out of 22 months.**

FCCS incorrectly assumes that because *In Re Young*, 76 Ohio St.3d 632, 669 N.E.2d 1140, confers jurisdiction over James Jr. to the court, the court is empowered to *sua sponte* extend temporary custody of James Jr. beyond the "sunset" date of October 6, 2003. However, nothing in the statutory scheme, nor any authoritative case law grants a juvenile court the ability to *sua sponte* grant or extend custody when no motion has been filed before it. Moreover, in the case presently before this Court, the trial court never gave any indication that it was or that it intended to act *sua sponte*.

In *Young* the Supreme Court of Ohio stated that, "[a]lthough the court has continuing jurisdiction, *temporary custody terminates* when the sunset date passes without a filing pursuant to R.C. 2151.415(A)." 76 Ohio St.3d at 637, 669 N.E.2d at 1144. (Emphasis added.) The only method to extend temporary custody beyond sunset date is for *the public children services agency* to file a motion with the court to extend temporary custody of the child pursuant to R.C. 2151.415(A) and (D)(1). *In Re Davis* (Nov 5, 1999), Pickaway App. Nos. 99 CA 20, 99 CA 21. R.C. 2151.415(D)(1) does not confer upon the court a right to extend temporary custody *sua*

*sponte*. R.C. 2151.415(D)(1) (authorizing the court to extend temporary custody “[i]f an agency \* \* \* requests the court to grant an extension of temporary custody \* \* \*.”)

The court's continuing jurisdiction to enter a disposition over James Jr., pursuant to *In Re Young*, does not cure the court's lack of statutory authority to extend temporary custody. The *Young* court alluded to this very proposition, stating,

"That juvenile courts have continuing jurisdiction does not mean that public services agencies \* \* \* can ignore the mandates of the statute and rely on the court to save them from their own failures or oversights. \* \* \* The obligation to file a motion thirty days prior to the sunset date is not vitiated and the failure to file is not harmless error." 76 Ohio St.3d at 638, 669 N.E.2d at 1144; see also *Endsley v. Endsley* (1993), 89 Ohio App.3d 306, 624 N.E.2d 270.

On February 27, 2007, the Third District Court of Appeals affirmed the reasoning of *Young*, finding that “In order for a permanent services agency to file a motion for permanent custody of a child, it must have current custody of the child \* \* \*.” *In Re Malone* (Feb 26, 2007), Marion App. Nos. 9-06-28, 9-06-29, 2007-Ohio-769. See also, *In Re Miller* (1995), 101 App.3d 199, 203. Thus, contrary to FCCS’ position, because FCCS failed to file a motion for extension of custody, FCCS lost custody of James Jr. on October 6, 2003, when its temporary custody order expired pursuant to *Young*. As a result, FCCS was barred from pursuing permanent custody prior to litigating a new request for temporary custody. *Malone*, 2007-Ohio-769 at ¶¶20-28.

For purposes of calculating the twelve out of twenty two months under R.C. 2151.414(B)(1)(d), James Jr. is considered to have entered custody on December 5, 2002, sixty days after his initial removal from his home. Because FCCS’ order of temporary custody of James Jr. expired on October 6, 2003, James Jr. was only in the temporary custody of FCCS for ten months.

### **III. R.C. 2151.414(B)(1)(d) violates the child James Jr.’s constitutional right to familial integrity.**

FCCS’s argument and case authority regarding the constitutionality of R.C. 2151.414(B)(1)(d) pertains only to the *parent’s* rights in a termination of permanent custody hearing. (Appellee’s Brief, at 11-14.) FCCS argues that because substantial procedures were employed to protect the child’s parents—including notice and a right to counsel throughout the proceedings—the parent’s rights were safeguarded. (Appellee’s Brief, at 15.)

FCCS fails to address, however, the issue of whether the *child’s* rights are adequately safeguarded by the statutory procedures. Children have a fundamental, protected right to familial integrity. *Moore*, 431 U.S. at 503. Because James Jr. was not afforded adequate due process in this case, including a lack of notice and opportunity through appointed counsel to challenge the initial restrictions on his liberty, R.C. 2151.414(B)(1)(d) is unconstitutional as applied to James Jr.

Moreover, even if James Jr. had been provided adequate procedural due process in this case, the statute is unconstitutional on its face because it is not narrowly tailored to protect the *child’s* fundamental rights. FCCS addresses only the statute’s impact on parent’s rights, and thus fails to address the central issue—whether the statute is constitutionally adequate to protect the child James Jr.’s fundamental rights.

### **IV. FCCS’ brief is factually inaccurate.**

FCCS incorrectly describes James Jr.’s current placement with his foster mother as “potentially adoptive.” (Appellee’s Brief, at 7.) In actuality, the undisputed evidence

demonstrates that James Jr.'s foster mother is not a candidate to adopt James Jr. (Transcript, at 52.) James Jr. does not have the option of remaining with his current foster family; rather, he may be reunited with his father, with whom he is bonded, or he may be placed permanently with FCCS, who will attempt to place him with an adoptive family whom he has never met.

FCCS also claims that James Sr. admitted that he did not pay child support. (Appellee Brief, p. 2.) James Sr. testified that he was never asked to pay child support while James Jr. was in the physical custody of FCCS. (Transcript, at 17.) Similarly, FCCS dismisses the housing James Sr. has secured in Oklahoma as insufficient because James Sr. will not own the house. (Appellee's Brief, at 5.) FCCS erroneously states that it has no obligation to investigate Ms. Dixon's home in Oklahoma because it is not owned or rented by James Sr. (Appellee's Brief, at 6.) James Sr.'s case plan never required ownership of a home, only "stable suitable housing." (Transcript, at 42.) FCCS investigated James Sr.'s parents' home as possible housing for James Jr. Similarly, Ms. Sharon Dixon's home would logically qualify as suitable housing. Finally, Appellee FCCS' implication that homeownership is required suggests that FCCS imposed an unconstitutional requirement.

Finally, FCCS illogically concludes that "since [James Sr.] did not admit responsibility for the abuse [of James Jr. alleged in the complaint], he could not have corrected the issue leading to the removal of the child", which serves as clear and convincing evidence that James Jr. cannot or should not be placed with James Sr. (Appellee's Brief, at 7.) James Sr. was never required to "admit responsibility" for the abuse charge in order to regain custody of James Jr. Rather, James Sr. was required to work towards completion of the case plan in order to achieve

reunification with James Jr. (Record, at 14.) Despite FCCS' contentions, the record reflects that James Sr. substantially completed the case plan.

### CONCLUSION

The proceedings which resulted in the severance of James Jr.'s constitutionally protected relationship with his father were structurally flawed and was deprived of his constitutional rights. Wherefore, James Jr. respectfully requests that this Honorable Court reverse the grant of permanent court commitment; recognize that FCCS' custody of James Jr. lapsed on October 6, 2003; and, release him to the custody of his father.

Respectfully submitted,

---

Angela M. Lloyd, Esq. (0076150)  
Attorney for the Appellant,  
James Wolfe, Jr.  
The Justice for Children Project  
The Moritz College of Law  
55 W. 12th Ave.  
Columbus, OH 43210  
P.O. Box 416  
614-292-9176  
Fax: 614-292-5511

---

Bridget Purdue, Legal Intern

---

Jason Macke, Esq. (0069870)  
Attorney for the Appellant,  
James Wolfe, Jr.  
The Justice for Children Project  
The Moritz College of Law  
55 W. 12th Ave.  
Columbus, OH 43210  
614-247-4236  
Fax: 614-292-5511

---

Alicia Zambelli, Legal Intern

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing REPLY BRIEF OF APPELLANT, JAMES WOLFE, JR., has been sent by regular U.S. mail in a postage prepaid envelope to:

Robert McClaren, Esq. (0046657)  
Franklin County Children Services  
855 W. Mound St.  
Columbus, Ohio 43223  
614-275-2587  
Fax: 614-275-2589

Karin Demaree, Esq. (0071696)  
Guardian Ad Litem for the Minor Child  
P.O. Box 416  
Worthington, OH 43082  
614-582-9777

Tariq H. Zeidan, Esq. (0078229)  
Joseph A. Nigh, Esq. (0078728)  
Attorneys for Appellant,  
James Wolfe, Sr.  
Nigh & Zeidan LLC  
536 S. High St.  
Columbus, OH 43210  
614-228-6889  
Fax: 614-228-0253

on this 19<sup>th</sup> day of March, 2007.

---

Alicia Zambelli  
Legal Intern

---

Bridget Purdue  
Legal Intern

---

Jason Macke, Esq. (0069870)  
Attorney for Appellant, James Wolfe, Jr.

---

Angela M. Lloyd, Esq. (0076150)  
Attorney for Appellant James Wolfe, Jr.